EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 02 Cr. 1503(SCR)
Sentence

DONALD ROTH,

Defendant.

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White Plains, N.Y.
April 15, 2005
3:10 p.m.

Before:

HON. STEPHEN C. ROBINSON,

District Judge

APPEARANCES

DAVID N. KELLEY
United States Attorney for the
Southern District of New York
CATHY SEIBEL
Assistant United States Attorney

LEWIS & FIORE
Attorneys for Defendant
DAVID L. LEWIS

THE DEPUTY CLERK: Your Honor, this is the matter of United States of America versus Donald Roth.

Starting with the government, can I have counsel state their appearance for the record, please

MS. SEIBEL: Good afternoon, your Honor.

Cathy Seibel for the government.

THE COURT: Good afternoon, Ms. Seibel.

MR. LEWIS: Good afternoon, your Honor.

I'm David Lewis.

THE COURT: Good afternoon, Mr. Lewis.

Good afternoon, Mr. Roth.

Please be seated.

We are here to sentence Mr. Roth on Criminal Indictment Superseder 7, 02 Crim. 1503.

First, let me ask you, Mr. Lewis. Have you had a sufficient opportunity to review the presentence report and sufficient opportunity to review it with your client?

MR. LEWIS: Yes, your Honor.

THE COURT: Thank you.

Ms. Seibel, have you seen and reviewed the presentence report?

MS. SEIBEL: Yes, your Honor.

THE COURT: Thank you.

I would have been stunned if either of you said you hadn't, given the volume of submissions in this case, which I

found quite interesting.

Let me just say for the record what I've reviewed in preparation of sentence, and you can tell me if there is something I've missed. And we will all hope that I have not.

First of all, I have reviewed the aforementioned presentence report. I have reviewed the presentence memorandum of law submitted on behalf of Mr. Roth by Mr. Lewis, which is a 128-page memorandum, with Exhibits A through Z and AA through II.

It is generally my practice to read into the record every document that I've reviewed, but I will simply leave it to say in this case, given that there are so many of them, that I have read every page of your submission here.

I've also read and reviewed your April 11th letter to the Court -- that's from Mr. Lewis -- which attached some letters. A couple, I had already received, but there are attached letters from Rev. Terri C. Luper of St. John's Evangelical Lutheran Church, a letter from a Mr. Andrew Huber, apparently undated, a letter from Patricia Thompson, also undated. I have reviewed Mr. Lewis's April 11th letter, which attached letters from the defendant, Mr. Roth, dated August 16th, 2004, and included his curriculum vitae, a letter from a Jeanne Muskat Roth, the defendant's wife. And I have reviewed the government's sentencing memorandum submitted by Ms. Seibel, which tips the scale at a mere 94 pages, and I have

the April 14th, 2005, fax from Mr. Lewis in response to the government's submission, which is a 29-page letter.

That's what I've reviewed in preparation of sentence. Counsel, am I missing something?

MS. SEIBEL: That looks like everything to me, Judge.

MR. LEWIS: No, your Honor, you're not.

THE COURT: Okay. Well, let me tell you how I intend to proceed here, and then we can move forward.

As it could well be imagined, in Mr. Lewis's 128-page memorandum, he raises many questions. And instead of going through them one by one, which would literally take us hours, I will recognize the issues that were raised and tell you how I have ruled on them, having read the submissions of counsel for the defendant and the government. I will attach all of the documents that I have reviewed as part of the record, so counsel can feel assured that any issues raised or arguments mentioned in these memoranda or letters will be a part of this record. But let me walk through the issues, and then we will talk about any that I have missed.

First, I should talk, I guess, briefly about Booker and Crosby and how I view how they relate to the sentencing guidelines and this case.

It is my view that after Booker, or what Booker teaches us is that there is no Sixth Amendment violation where the guidelines are advisory and not mandatory. Therefore, the

Court may consider enhancing factors which were not admitted by the defendant or found by the jury, and the Court may consider them in finding what is the appropriate guideline range, recognizing that the guideline is not mandatory. The Court does not have to issue a sentence within the guideline range, only one that is reasonable.

Booker further makes it clear that the Court, the sentencing Court, should consider the guidelines in formulating a reasonable sentence. And I will state for the record that I do. I take them very seriously.

In Crosby, the Second Circuit found that there was no duty to apply the guidelines; that is, apply them on a mandatory basis after Booker, but that there is a duty to consider them in fashioning a sentence. That Court does not make it clear what weight ought to be given to the guidelines, whether there should be heavy weight given to the guidelines, moderate weight, light weight. But they make it clear in Crosby that it would be error for a sentencing judge to limit consideration to the applicable guideline facts found by a jury or admitted by the defendant. Instead, the circuit makes it clear that the Court must find an applicable guideline range, including enhancements, based on facts found by a court to a preponderance or by a preponderance of the evidence.

Okay. So that's the framework I'm operating in. To the extent anyone disagrees with that, it is noted in your

papers, and you've got that exception.

All right. So let me go through some of what is going on here. With respect to the presentence report, the defendant objects, in one way or another, to Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, the footnote on Page 23, 25, 35, 48, 67, 69, 70 and 76.

What I have done is gone through, in light of those objections and the government's response, and made certain changes to the presentence report, which I will go through right now. To the extent that there were objections raised to a paragraph and I say nothing about it, that means I have rejected the objection and left the presentence report as standing.

Okay. The first change that I make in the presentence report is to Paragraph Number 15, which is to strike in its entirety.

With respect to the paragraph numbered 16, I add language on the very first line. At the end of the first line, after the word "relationship," I wrote in "as lawyer and investigator." So that sentence will read, that first sentence will read, "Prior to Raymond Bryant's arrest, Roth and St. John had a pre-existing relationship as lawyer and investigator with the Bryant family." At the end of that paragraph, I add the following sentence: "Roth also represented Raymond Bryant on state assault charges, Malcolm Bryant on state drug charges,

and Timothy Cherry on state drug charges.

Paragraph Number 19, I strike it in its entirety.

Paragraph Number 25, I strike it in its entirety.

Paragraph Number 48, I change that first sentence to read, "Roth describes a normal development." The report says "an eventful development." I took out the word "eventful" and said "normal" and said, "Roth describes a normal development."

I will allow you, Mr. Lewis, at this point, since this was not specific wording that you requested, if you think that wording is improper or inappropriate, to let me know.

MR. LEWIS: No, I think it's better than I suggested.

THE COURT: Okay. I think there is one more. Yes. On Paragraph Number 67, I strike out "7-Eleven attorney" in the first sentence, and the second sentence in its entirety. So Paragraph Number 67 will now read, "Roth advises that from June 1997 through October 1998, he was a full-time volunteer with First Defense Legal Aid, Chicago, Illinois." I struck the sentence, "We note that the defendant did not earn his juris doctor degree until February 1998." That is stricken.

Okay. I note that the defendant objected to any and all characterizations of the affidavits as "false and detailed," two separate words, not as one phrase. And I will say for the record I left those in, because I found those characterizations are accurate and true.

The defendant objected to the cross-reference in the

guidelines under the Sentencing Guideline Section 2J1.2(c). I find that the cross-reference is mandatory. I find that even if it's not mandatory, I believe it applies in this case. And I believe that the cross-reference is still applicable, even after Blakely, when you consider Booker, as I've stated before; that is, that the guidelines are not mandatory, but are advisory.

So my calculation is that Mr. Roth has a total offense level of 34 -- I'll tell you about the two points I add for obstruction in a moment -- and a Criminal History Category of I, with a proposed guideline range of 151 to 188 months. In this case, there is a statutory maximum of 60 months.

Let me talk about the upward departures.

The defendant objected to the four-level upward departure for role in the offense and the characterization of Mr. Roth.

MR. LEWIS: Excuse me, your Honor. They're adjustments.

THE COURT: Adjustments. I'm sorry. Not upward departure, but adjustments to the guideline range -- thank you -- for role in the offense. I will state my findings about this very briefly.

The defendant was an organizer and leader, because he was a decision-maker and directed what was found to be illegal activity of others, namely, that of Mr. St. John. The

defendant hired Mr. St. John. He directed Mr. St. John's activities. He directed the criminal aspects of the defense of Malcolm Bryant and Mr. Tim Cherry. He encouraged Mr. Melvin to sign a false affidavit. He directed affidavits of Yolanda Delgado and Raymond Bryant. I think that though the enhancement requires that there were five or more people involved, first, the direction of one of the persons, I believe, is sufficient. But in any event, the others that I believe would make up that five include Mr. St. John, Mr. Malcolm Bryant, Mr. Tim Cherry, Mr. Raymond Bryant and Ms. Yolanda Delgado. So I find that that four-level enhancement is appropriate.

I find that the two-level enhancement for use of a minor --

MS. SEIBEL: Your Honor, I'm sorry to interrupt. I think you misspoke in discussing leadership adjustment. You said that Mr. Roth directed the cases of Tim Cherry and Malcolm Bryant. I think you meant Raymond Bryant and Tim Cherry. And then you said Yolanda Delgado and Raymond Bryant, and I think you meant to say Yolanda Delgado and Malcolm Bryant.

THE COURT: Okay. Let's get that right. Let me go back. Right.

The Court believes that Mr. Roth directed the criminal aspects of the defense of Raymond Bryant and Mr. Cherry, and directed the activities of Yolanda Delgado and Malcolm Bryant.

Thank you.

With respect to the two-level enhancement for use of a minor, the minor alleged was Malcolm Bryant, who was 17 at the time of the relevant events in this case. And I find that both Mr. Roth and Mr. St. John spoke to Malcolm Bryant, who was 17 at the time, and elicited his help in what the jury found to be an illegal scheme. Roth had both direct contact with Malcolm Bryant and indirect contact with him through Mr. St. John and others. And in my view, this activity clearly falls under Section 3B1.4, and warrants a two-level enhancement.

With respect to the enhancement or adjustment of the two-level enhancement, it is my view that after Booker and Crosby, it is clear that the Court can and should make a finding re: enhancements based on obstruction of justice, even if the jury did not make such a finding. And I find that the defendant has clearly lied in his testimony under oath.

Additionally, the jury, by the fact of their verdict, in my view, necessarily had to find that Mr. Roth lied on the witness stand, by rendering the guilty verdict that they did, among other things outlined in the government's submissions on Pages 29 through 36.

I will just mention in particular that I believe Mr. Roth lied about his state of mind during the course of his activities. I believe he lied about having agreed to obstruct justice, about having agreed to obtain false affidavits from

Mr. Cherry, about the conversations he had with Mr. Bryant regarding Mr. Bryant's innocence. I believe he lied in his testimony about conversations he had with Mr. Bryant about Flip Melvin being a confidential informant. I believe he lied when he said that he had never discussed the false affidavits. And I believe he lied in his testimony about his discussions with Mr. St. John.

Any one of those would be significant and material and warrant an obstruction enhancement, and I find clearly all of them together warrant such an enhancement.

So that's how I got from a 26 to a 34, finding that the cross-reference applied on a base of 26, applied the two-level enhancement for the use of a minor, four-level enhancement for the role in the offense and the two-level enhancement for obstruction, which brought me to a Level 34, Category I.

As I said, the statutory maximum in this case is 60 months. But I do believe it is important for the Court to at least lay out what it believes the appropriate guideline, Criminal History Category, offense level and range ought to be.

Ms. Seibel.

MS. SEIBEL: Sorry to interrupt again, your Honor.

Although I think it's implicit and maybe even explicit in what your Honor already said, I would ask the Court to make a finding in connection with the obstruction of justice that

you find the defendant consciously acted with the purpose of obstructing justice, and that the false statements were not by mistake or accident, et cetera.

THE COURT: I do find and believe that the defendant lied in his testimony, with the intent to obstruct justice; that these were not merely mistakes, inadvertent, but that they were conscious and clear and planned. And so if it wasn't explicitly clear, I want to make it clear that I believe this defendant knowingly and intentionally obstructed justice.

Yes, I meant to, but didn't, mention in here his conversations with his attorney friend who testified, whose name escapes me for a moment.

MS. SEIBEL: Frank Wallace.

THE COURT: Mr. Wallace. Where it became clear, if it had not been clear up to that point, it became completely clear that Mr. Roth was touting his ability to get witnesses to change their story, even before having spoken to that witness. And I found that particularly compelling, but certainly not the only compelling factor that made it clear to me that in many respects, Mr. Roth's testimony was not truthful, and intentionally so.

All right. So that's where we start. Let me just be clear for the record. I do not intend to go back over each of the arguments made in the 129-page submission with the 30 or so exhibits, or the government's 92-page submission; though, if

there is some issue that has not been raised in these tomes before; obviously, counsel should raise them now, so that the Court can consider them. But I do not intend to go over any of the arguments raised. But, for instance, if there was an objection to a paragraph of the presentence report that I did not list by number, please advise me of that now.

Mr. Lewis.

MR. LEWIS: I'm sorry. Your Honor said that -- I'm sorry.

THE COURT: What I'm just asking is, I listed -- I don't know; I'm just guessing -- 30 paragraphs.

MR. LEWIS: You did not miss an objection.

THE COURT: All right. Thank you.

Well, in this, as in all criminal sentencings, the defendant has an absolute right to be heard.

MR. LEWIS: Your Honor, would you just entertain one brief sentence about the "cross-reference" issue?

THE COURT: Sure.

MR. LEWIS: The government's contention, and what it appears the Court has adopted, is that after Booker, the issue of the cross-reference falls out, because the guidelines are not mandatory. And this is the only point I want to make. Because the cross-reference so jacks up the offense multiple, is a multiple, even though there is a rounding down, by virtue of the conviction, the fact that the cross-reference

application occasioned such a large guideline sentence, we believe it still violates the rule of Apprendi.

While Booker gives a remedy for the problem raised by Blakely, the Apprendi problem -- and that is the consequence of the cross-reference and the lack of a jury verdict under the Sixth Amendment as regards that cross-reference, because it relates to the acts of Cherry and Bryant -- still, we believe, still offends the Sixth Amendment and still creates the Apprendi problem.

THE COURT: Let me ask you, Mr. Lewis, on a slightly related problem. Assume for a moment you're right about that. What is the offense level, then, that we're starting with under your assessment?

MR. LEWIS: Twelve.

THE COURT: Starting with a 12.

MR. LEWIS: And because of the obstruction, even if you start with 14, that would be the base offense level.

And the other view of it is that the obstruction consequences, as the cross-reference makes it, is not tied to any act of Congress or any other decision, except that the Sentencing Commission made that decision. And that's where the Apprendi question comes in.

THE COURT: I understand your argument. I disagree. You stated that in your papers. And I assume you're going to appeal this sentence, and the Second Circuit will have a chance

to grapple with it.

Having said that, is there any other issue that you need to raise at this time?

MR. LEWIS: No.

THE COURT: Thank you. All right. Well, the defendant has an absolute right to be heard at sentence.

And I'll start with you, Mr. Lewis. If there are any statements you wish to make, present any information to the Court in mitigation of sentence, please do.

MR. LEWIS: Your Honor, what I'd like to do is talk to the Court a bit about the post-Booker atmosphere and the decision that the Court has to make, the guidelines being a component, and Crosby not directing us, in terms of what the weight should be.

We've asked in our papers for a sentence that is not a sentence of incarceration, and we've asked for that, because we believe that the goals of the system, as set out by the statute, would be fulfilled by a sentence that doesn't include incarceration.

The guidelines are -- in weighing the guidelines and in weighing the post-Booker world about those guidelines, I understand that we're not returning to the pre-guideline world, and I know that there are very few of us who are left who remember actually sentencing under the pre-guideline --

THE COURT: More than a few of us, because I was an

Assistant in that world, and so was Ms. Seibel, who sits next to you.

I hate to divulge your age, but it's the truth.

MR. LEWIS: I was going to say that perhaps the three of us may be the only ones who do remember that.

The reasons that the Court should, I believe, consider the possibility of probation are the nature and circumstances and the history and characteristics of the defendant. We've laid out -- and I'm not going to repeat for you the letters -- we've laid out Mr. Roth's attempt to try and make something of his life after this conviction. The people whom he's helped, the people who he's cared about, the church, as well as his family, have come today to court to stand behind him through its representatives. What we're talking about, also, is whether or not we can punish Mr. Roth in the sentence, but still obtain from him some work of real value, something that doesn't waste the time and the energy and the talent and the government's money by sentencing him to jail.

He has taken steps to respond to the conviction, that is, not saying that he has said, "I have done it," but rather, by his conduct, he has indicated that he wishes to demonstrate that he has an opportunity and a role to play outside of prison and in the society that he lives in, and that he has an opportunity to make a contribution.

This is in the nature of a different observation, but

it is something that might be worthy of the Court's consideration. As a defense lawyer, very often, when we stand here to talk about the result or the consequence of acts, those of us who believe in method defense lawyering try to put ourselves in the position of the defendants when we speak for them. This case, in some ways, cuts extremely close. While I understand the verdict and the findings your Honor has made on the enhancements, the lines between what defense lawyers do and cannot do, as dictated, in part, by the law, as determined by a jury after a grand jury, obtained, in part, in effect, by our adversaries, puts the government in the position of being more of an impact-statement-maker than necessarily the neutral and detached advocates they are in so many cases.

Here, this man, in an attempt to defend these people, reached out and tried to do something that the government and the jury has found to be criminal. The ABA guidelines tell us that we have a duty to investigate. The "ineffective assistance" cases like Strictland tell us that our duty to investigate becomes less when the client tells us more, but the duty remains. We also have an opportunity and an obligation sometimes to continue to investigate, even when our client has told us that he has done it, principally because the test is not whether the defendant has done the act, but whether the government can prove it, which is what the system is about. So the need to inquire and the need to press sometimes pushes

lawyers, and not necessarily unreasonably, to be able to develop tactics that actually test whether the government's witnesses are telling the truth outside the forum of the courtroom, in order to collect material that can be used for cross-examination.

So on one level, if Flip Melvin decided, for example, that he would sign that affidavit, there is proof that he would basically do whatever anybody asked him to do.

Now, I'm not telling you that's the case in this case. I'm telling you about how close the line is and how close one act may be under that "safe harbor" provision of Title 18, 15(c), and another act would be over the line. But the line is a difficult thing sometimes. And the ethics of one side, such as the criminal lawyer's ethics, and the ethics as are found by our adversary that goes the other way in other cases are different. It's enough to make professors have long-term employment and tenure at law schools all over the country.

What I'm trying to talk about is that the line of criminality is so waving in so many ways that it becomes a dangerous precedent for the practice of law for the defendant. This conviction, the Court understands, is going to be tested on appeal. But most importantly, in terms of looking at this defendant, his nature and his circumstances, whether it's his mother's description of his competitiveness or his own zeal to represent his clients, which led him into the position he is

today. That's a different type of criminality than usually you're seeing here. It's a different type of action. And if Mr. Roth's action has been for defendants charged with different crimes, that cross-reference would have driven down these numbers, rather than raise them.

The bottom line, I think, is that in trying to figure out who he is, because Booker directs the Court to make that assessment, too, who he is is more than this conviction, and more than the Cherry and Bryant cases, and more than the slippage over the line from a series of tactics that may be considered legal, to a series of tactics that have at least been found by a jury to be illegal, and in trying to figure out how to sentence him, considering all the variables, which include retribution and individual deterrence, and collective deterrence, the question is: What is best, not just for Mr. Roth, but for the system in which we live?

I submit to you that a jail sentence would not be the most effective message. If there is to be value in his work and who he is, and the value, in terms of what he's done in his life that he has earned in some cases, the consideration is that he should be allowed to continue that work, and that the Court impose upon him a series of conditions that don't include jail, but rather put him in the position of making a direct contribution to the community, and pay back the system in a way that the system could have some use for it. That's our

application.

It is a little unusual to actually make that application, but since Booker has opened the door for the first time in quite sometime, it's a matter of whether, A, the lawyers have, in some ways, the courage to make them for their clients; and whether they have a client who deserves it. It's a rare opportunity to have both. It doesn't take much courage to make the application, because the line between courage and foolhardiness is sometimes for us very thin, as well. But Donald Roth's entire life and everything he's done before and after this are enough to secure the Court's interest, I believe, and enough to justify a sentence that doesn't include incarceration.

In asking for that, I understand I swim against the tide, but there are tides and defendants that really do merit something other than jail, and instead test the creativity of the process in making sure it gets what it deserves, without describing either the defendant or some of the values that the defendant has successfully represented over his lifetime.

Thank you.

THE COURT: Mr. Roth, if you wish to make a statement or present any information in mitigation of sentence, now is the time.

THE DEFENDANT: I don't, your Honor.

THE COURT: All right. Ms. Seibel, any statement the

government wishes to make?

MS. SEIBEL: Just two quick things briefly, your Honor.

First of all, I keep reading about, and today heard Mr. Lewis refer to, the idea that what was going on in connection with Flip in this case is that the defense was trying to get him to falsely exculpate Mr. Roth's clients, so that later, he could be cross-examined, the idea being that if Flip signed an affidavit falsely saying Tim Cherry is not a drug dealer, falsely saying Ray Bryant is not a drug dealer, this is something that Mr. Roth would have used at trial to show that Flip is a liar.

And that is absurd, because, obviously, Mr. Roth is not going to stand up at trial and say to the jury: "Don't believe Flip. He's a liar. He's willing to falsely state that Tim Cherry is not a drug dealer, when we all know Tim Cherry is." It's absurd. No defense lawyer is going to defend his client accused of drug dealing by saying that "The informant falsely claimed my client wasn't a drug dealer." That's why I assume Mr. Roth never testified or came close to testifying to what Mr. Lewis is now suggesting, that this was just an exercise in testing the credibility of the informant.

And the only other thing I wanted to add, I think your Honor got more than enough of a taste, in the government's papers, as to how seriously the government takes this. And I

like to think it's not simply because prosecutors and defense lawyers are adversaries. In fact, I sincerely believe it has nothing to do with it. The laws that this defendant violated protect criminal defendants. They protect everybody who sets forth in the courtroom.

The notion that you shouldn't obstruct justice isn't something that offends me as a prosecutor. It offends me as a citizen. Anybody who comes into a courtroom and -- honestly, if the situation were reversed, and your Honor was about to sentence a prosecutor who tried to get a witness to lie, nobody would be having any discussions about fuzzy lines or, you know, over zealousness. That's not what this case is about. It's plain and simple. It's false evidence, not a blurry area. It's not something that a defense lawyer, in good faith, could think was okay.

And in terms of sending the most effective message, to use Mr. Lewis's words, a sentence of probation would send about the worst message imaginable. It would send the message that you can knowingly use false testimony, and all that's going to happen to you is, you're going to lose your ticket to practice law.

The government recognizes that your Honor doesn't have to apply the guidelines, and your Honor ought to consider 3553(a). We ask your Honor to do that. But included in 3553(a) is the need for the sentence to reflect the seriousness

of the offense, to promote respect for the law, and to provide just punishment, to protect the public and to afford adequate deterrence.

And for all of those reasons, a sentence of probation would be, in the government's view, widely inappropriate, particularly in light of the fact that my impression, from all the papers I've looked at, is that we're talking about a defendant who doesn't think he did anything wrong, and, given the opportunity, would do this again.

THE COURT: Well, that may not be fully fair. The defendant is appealing his conviction, and is not in a position at this point to say, "What I did was wrong," because that would be, in effect, saying to the appeals court, "The jury got it right."

MS. SEIBEL: I don't suggest that. I'm sorry to interrupt, Judge.

THE COURT: Everybody likes to interrupt me today.

What is that, Mr. Skolnik?

THE DEPUTY CLERK: It's tax day.

THE COURT: Oh, right.

MS. SEIBEL: I don't suggest that the defendant should come in and say: "You're right. I did it." I also don't expect a defendant in these circumstances to come in and tell the judge that "My role as a criminal defense lawyer excuses what the jury found I did." I don't expect the defendant to

come in and say, "These laws exist to protect prosecutions." I don't expect the defendant to come in and say, "You can't really know what the truth is." And all those ideas were floating through the defense papers: "Since you can't know what the truth is, you know, what I did was okay."

So the point I want to make, simply, is that the defense is asking you to disregard the guidelines and give an extremely lenient sentence. And I don't see any basis in this case, particularly given that I don't see in any defense submissions a recognition of the seriousness of the offense. Even a defendant who is claiming he didn't do it can recognize that someone who did do that would have done something very serious. And my impression, from the defense papers, is that litigating is a game, and we're all out to move our chess pieces how we want. And that's not how it works.

THE COURT: I hear you, Ms. Seibel. And on that point, I do disagree. I think, I hope, I think counsel would say that if one did, in fact, obstruct justice intentionally and knowingly in the way that this defendant stands convicted of having done, that that's a very serious thing. I think that what they would say is, one -- and I'm not putting any words in their mouth, but one, "I didn't do that," still. Okay? That's fair.

And two, I think what I took out of both Mr. Lewis's comments and the submission was that there comes a point when

an attorney decides to act zealously on the part of their client. And the question then becomes: Where is that line? Clearly, there is a line. There are the criminal statutes that say there is a line. But where is that line? What is the conduct that the defendant engages in that makes -- that a lawyer could engage in that would take him across that line, and did that happen here?

I've stated clearly my view already. I think Mr. Roth was not truthful, lied on the stand during the course of his testimony. So obviously, I have a view of his knowledge of that lying, and where he went. But I'm not sure it's fair to say that he would think there is no line. I think it may be that maybe reasonably, and rightfully so -- and the Second Circuit will give us some more guidance in that respect -- he thought he didn't cross that line. The jury thought differently.

I saw you itching to get up, Mr. Lewis, and I'll allow you to respond.

MR. LEWIS: Just briefly.

It's not a game. We take it seriously, and we said so in our papers. The Court clearly understood our argument.

In terms of whether the Flip Melvin affidavit could be used at trial, as a defense lawyer, it could certainly be shown that the man will sign anything; not that it's true, but that he's willing to do it. So there is a tactic that's tied to

that. And the reason for that discussion is to show how that line can be perceived in a number of ways, and the Court understood that.

With regard to the government's position that only a jail sentence will satisfy the terms and conditions of the statute, probation has long been seen as a means to vindicate the authority of the law. It has been -- before the guidelines, it was seen as that. That has not changed. Probation is available under departure grounds. And within that zone, that limited zone, and it apparently is an effective means of not only vindicating the authority, but effectively protecting the public from further violations, fulfilling the terms of the statute.

A lawyer who loses his livelihood -- the government says the only thing he loses is his license -- he loses what he's worked his entire lifetime for, and most likely loses something he's identified by and with. It's a loss of position in the community. It's a loss of position to one's self. And to lose one's livelihood by virtue of one's actions is also a punishment.

But what is significant, I think, in the desire to have a sentence of probation and the message that it sends is not that he has done nothing wrong and has gotten off scot-free. That's not what we're asking for. That's not what it means. And it's not a public perception, as if it's a

tabloid determination that there is a sentence, and it's Club Med, or any of that. But the reality of providing him with a sentence that causes him to continue to contribute to the community, that causes him to do certain things, because he's been ordered to by the Court, and to make it clear in the sentence, as well as in whatever publicity the government generates by their press release after the sentence, it is a sentence that is a criminal sentence and carries with it the opprobrium of being a convicted felon. And that, too, is a weight that one carries in this society.

For too long, we have seen the only answer is jail. And the only response the system has been able to come up with is incarceration. We have now a day where that may not be necessary, and when that's not necessary. It engages us in determining for the first time something not mechanical and not lock-step, but engages us in the opportunity to formulate a sentence that enables the individual to come and re-integrate in that community quickly and sufficiently, so that he can make a contribution.

The guidelines prevented much of that for defendants like Donald Roth. The guidelines also were designed to make white-collar defendants serve greater amounts of time, as a policy of the Commission. So some of the things -- and I don't want to belabor it, but I laid them out quoting from Judge Gertner's opinion what's wrong with the guidelines. But the

reason I'm telling you that is that the guidelines were the things that drove us away from probation in white-collar cases, drove us away from the use of that tool as a technique for determining a punishment. And now that we are not driven that way by a mandatory system, we need to return to the opportunity to look at those other options and other ideas. Even before the guidelines were struck down, there was some discussion in the Second Circuit, where there were departures about if there was a sufficient reason for departure, what sentence should be formulated that could give back to the community and respond to the other 3553(a) considerations.

So we're not asking for a pass. We're not saying to the rest of the world, "If he gets probation, he got away with it." We're saying that the man, stripped of his livelihood and stripped of his identity in the community and branded as a felon, should now also continue to contribute back to that community, not for his exclusive benefit, and not to lay fallow for a period of time in a jail cell. That's what the request for probation is.

THE COURT: Well, thank you.

I will describe the sentence that I intend to impose, and the attorneys will have a final opportunity to make any legal objections before the sentence is finally imposed.

I will state that I do look at 3553(a) and its requirement that I take into account both the nature and

circumstances of the offense, the history and characteristics of this defendant, and try to make or fashion a sentence that reflects the seriousness of the offense, and is one that promotes respect for the law, provides just and adequate punishment and affords an adequate deterrence, both for criminal conduct of this defendant in the future, and others.

Having said that, I will say that, in my view, the crime that this defendant has been convicted of is a particularly damaging one. And it is a damaging one, because, in contrast to most other offenses that we see, they don't really speak to a direct impact on the criminal justice system. They are horrible offenses often, but this offense is particularly troubling to me, because it goes to the integrity of the criminal justice system and what those participants in it, both participants in it as defendants, as actors and then all of us as general citizens, what they will make of the system. And when you have a participant in that system who stands convicted of subverting the system, it is a particularly egregious thing.

And so a sentence that doesn't include incarceration, to me, would be an astounding thing in this case, and it would be astounding, because it would cause people to look up and say, "Why didn't he get a sentence?" And the answer would be, "Well, he didn't get a sentence, because he's a lawyer and he's a player in the system, so he could do" -- what I view -- "the

most egregious thing in the system" -- that is, subvert it -- "and nothing will happen, in terms of incarceration." So for me, that's off the table.

I do and I did read the letters with interest, and I do take into account that Mr. Roth has provided some significant services to his church and to the community, and that those services have been revved up after the date of his conviction. And that's fine, and that's a good thing. However, it does not move me away from a view of this matter and its particular seriousness.

The last thing I will say -- and I generally try not to lecture too long at sentences, because I don't think it matters to anyone, other than me -- I do believe that Mr. Roth lied on the witness stand about many material, significant matters in this case. And that, to me, was a further rebuke of the system. And many people do it. And I always take that seriously. I particularly take it seriously in the case of Mr. Roth, who is an intelligent person, and was a lawyer, is a lawyer.

I will also say, to be fair to Mr. Roth, that I have always viewed this matter as one where it was a slippery slope. I do not believe that Mr. Roth decided the day that he became a lawyer that he would do anything to help his clients win, and I do not believe that he entered the practice of law with the intention of soliciting false documentation from witnesses. I

don't believe that. I do believe that it is a path that he, as many defense attorneys, wandered down, and Mr. Roth kept wandering down the path until he clearly walked past the line. I hope, I think, that most defense lawyers don't pass that line in quite that way.

I actually believe, in this case, that the evidence was clear that with the knowledge that the information that was solicited from some of these witnesses was false, Mr. Roth, with and through Mr. St. John, nonetheless, pressured those individuals to sign affidavits that were false, in order to help his clients.

I think the evidence in the case was that he not only bragged about the fact that he could get witnesses to recant their testimony after he had done it in one of the most telling portions of the trial for me, he actually bragged that he would get it to happen before it was done. And that was why the testimony of the lawyer who Mr. Roth was talking to, if I remember it correctly, in order to talk to him about representing a co-defendant in a case, said to that person, that he, in fact, would get the witness to recant.

And so I think that his practice evolved into a place where that behavior was practiced knowingly and anticipated. And I find that troubling.

I set out as my guideline calculation -- and interestingly enough, I argued with the government a sentence

ago about being in a place where, through miscalculations, the guideline range was drastically higher than they anticipated. In this case, it is also, at least anticipated, in the sense of the way that they charged the case. Because had they charged this case in a different way, as I've stated before, I believe the appropriate guideline range was 151 to 188 months. But because of the way they charged it, they're left with the statutory cap of 60 months.

And that's going to be my sentence, the term of incarceration of 60 months, three years of supervised release. I am going to impose a fine of $10,000, and a special assessment of $100.

With respect to the term of supervised release, the defendant shall not commit another federal, state or local crime; the defendant shall not possess a controlled substance; the defendant shall not possess a firearm or destructive device.

And the mandatory drug testing provision is suspended, based on the Court's determination that the defendant poses a low risk of future substance abuse.

The standard conditions of supervision are ordered, with the following special conditions:

The defendant shall provide the Probation Officer with access to any requested financial information.

The defendant shall not incur any new credit card

charges or open additional lines of credit without the approval of the Probation Officer, unless the defendant is in compliance with the installment payment schedule.

The defendant is to report to the nearest Probation Office within 72 hours of his release from custody.

And it is recommended that the defendant be supervised in his district of residence.

It is recommended that the defendant pay a fine of $10,000 within 30 days after sentencing or release from confinement. In the event that he doesn't pay the fine in full within the time period listed that I just stated, he is to pay it in monthly installments of at least 15 percent of his gross monthly wages during the period of his supervised release.

I will hear argument from counsel about whether or not the defendant should be granted bail pending appeal.

Let me ask you, Ms. Seibel. We'll start with you. Do you object to this defendant being given bail pending appeal?

MS. SEIBEL: Your Honor, we don't believe he meets the statutory criteria. But beyond what we've said in our papers, I don't have anything to add.

THE COURT: Mr. Lewis?

MR. LEWIS: Your Honor, we believe that he meets the criteria that there is a substantial issue. We laid out in the papers what those positions are. And in our response, we believe that the issue of the "other crimes" evidence and its

admission alone would be a substantial issue. And we ask that he be granted bail pending appeal.

THE COURT: There is a substantial issue, and anything else?

MR. LEWIS: That it would cause a reversal and modification, but since it's a single count, anything that impacts on the single count of conviction would be, by itself, cause for reversal.

THE COURT: Ms. Seibel?

MS. SEIBEL: I don't think it's that simple. I think there are errors that, which, of course, I don't concede there were, but I think there are errors which the Second Circuit can find are errors, but that they were harmless or not germane. And so I don't think an error that's substantial, by definition, will result in a reversal.

MR. LEWIS: With all respect, I think the case law goes to the contrary. The Randall case talks about a substantial issue that affects the outcome.

THE COURT: My question is this: Do I have to find, Mr. Lewis and Ms. Seibel, do I have to find that the defendant is likely to succeed on the issue raised, or simply that there is an issue being raised?

MS. SEIBEL: I think we're in agreement that you don't have to find that you expect to be reversed.

THE COURT: Okay. Then I'm going to grant bail

pending appeal.

The current bail conditions shall remain in effect.

Should the Probation Office determine at any point that any additional conditions are necessary, they obviously are free to make application to the Court, and I will consider it.

Anything else at this time?

MR. LEWIS: No, your Honor.

THE COURT: All right. Well, I will impose the sentence as stated, and it is so ordered.

And let me advise you, Mr. Roth, you can appeal your conviction, which it is clear you will do, if you believe that your guilty verdict was unlawful in some way, or subject to error by the Court. You may also have a statutory right to appeal this sentence under certain circumstances, like if you think that the sentence is contrary to law.

With few exceptions, any notice of appeal must be filed within ten days of judgment being entered in your case. If you are unable to pay for the cost of appeal you may apply for leave to appeal in forma pauperis. And if you so request, the Clerk of Court will prepare and file a notice of appeal on your behalf.

MR. LEWIS: Your Honor, I will undertake the filing of the notice of appeal. I just need to have some idea when and how we'll get the judgment, so we don't lose time. I know that

the judge has my fax number. If the Court would just fax the judgment when it's completed to us, we will file a notice in the Southern District in Manhattan.

THE COURT: Great.

Thank you. We will make sure that you get it.

MR. LEWIS: Thank you, your Honor.

THE COURT: Anything else?

MR. LEWIS: No, your Honor.

MS. SEIBEL: No, your Honor.

Thank you.

THE COURT: Thank you.

Have a good weekend.

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